No. 92-515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On A Writ of *Certiorari*
To The Supreme Court of Wisconsin

BRIEF OF THE REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Reason Foundation is a California, non-profit organization whose goal is to promote the following principles of a free society: limited government, property rights, personal liberties, and a free-market system. The

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[1]Reason Foundation, 3415 Sepulveda Blvd., Suite 400, Los Angeles, CA 90034. Letters of consent to the filing of this brief have been submitted to the Clerk of Court pursuant to Rule 37.3.

Foundation, founded in 1978, is interested in advancing ideas that have a theoretical or practical application for public policy and current affairs. Its projects include *Reason* magazine and a research program.

The issue in this case is of interest to the Reason Foundation because penalty enhancement statutes pose a serious threat to First Amendment liberties.[2] Since Wisconsin's penalty enhancement statute so clearly implicates both the role of government in regulating speech and the liberty of the individual to express even biased thoughts, this case deals with matters of fundamental importance to the Reason Foundation. In keeping with its emphasis on limited government, the Reason Foundation opposes the penalty enhancement statute. We submit this *amicus curiae* brief to offer the Court the benefit of our views.

SUMMARY OF ARGUMENT

The dissenting opinion of Justice Bablitch in *State v. Mitchell*, 485 N.W.2d 807 (1992), compared the Wisconsin penalty enhancement statute, Wis. Stat. § 939.645 (1989-90), to civil antidiscrimination laws. *Id.* at 819-20 (Bablitch, J., dissenting). The majority opinion rejected this analogy and drew a distinction between civil and criminal antidiscrimination statutes. *Id.* at 817. The majority did not analyze the constitutional differences between the civil and criminal statutes but simply stated that the differences present a "schism in the First Amendment's protective shield," *Id.* However, a more extensive analysis of the radical constitutional difference between civil and criminal antidiscrimination statutes shows that they are similar in name only. Such analysis also shows that the penalty

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[2]*See* Jacob Sullum, *What's Hate Got To Do With It? Do Crimes of Bigotry Deserve Extra Punishment?* REASON, December 1992 at 15.

enhancement statute does not penalize conduct. It penalizes thought.

We leave to the parties and the other *amici* the analysis of why the statute violates the First Amendment. This brief will concentrate on analyzing the constitutional differences between civil antidiscrimination laws and the penalty enhancement statute to show that the latter does penalize thought rather than conduct. Thus, the analysis will ultimately demonstrate that the penalty enhancement statute violates the First Amendment, as the Wisconsin Supreme Court correctly concluded.

Penalty enhancement statutes for bias crimes are different from civil antidiscrimination laws because criminal defendants are protected by the Fifth Amendment. The Fifth Amendment protects the defendant from being punished more than once for the same offense, and it guarantees the defendant the right to put on a legitimate defense to criminal charges without risking self-incrimination imposed by the government. Wisconsin's penalty enhancement statute potentially violates each of these protections.

As a preliminary matter, it is important to note that penalty enhancement statutes for crimes with a bias motive are not actually antidiscrimination laws. There is no such thing as an equal opportunity to be a crime victim which the state has an interest in protecting. Nor should perpetrators of random crimes be less severely punished than perpetrators who intentionally select their victim. Yet this is the logical conclusion and consequence of viewing the penalty enhancement statute as simply another antidiscrimination law.

Moreover, it is a misnomer and redundant to call these

laws "hate crimes" statutes, as if "hate crimes" were a distinct species of crime. All crimes are "hate" crimes because crime involves violating the person or property of another in some way. The logical opposite of a "hate crime," namely a "love crime," is a contradiction in terms.

ARGUMENT

I. WHEN TRADITIONAL DOUBLE JEOPARDY ANALYSIS IS APPLIED TO MITCHELL'S CASE, IT BECOMES CLEAR THAT WISCONSIN'S PENALTY ENHANCEMENT STATUTE PROHIBITS THOUGHT RATHER THAN CONDUCT.

Proponents of Wisconsin's penalty enhancement statute argue that the statute punishes conduct, not thought. However, if the gravamen of the offense is conduct rather than thought, the statute violates the Fifth Amendment's Double Jeopardy Clause because the statute prohibits the same *actus reus* and the same *mens rea* for which the jury is required to find guilt under the criminal statute for the underlying crime. Since the jury must find a separate verdict of guilt under the penalty enhancement statute, the jury must therefore find the defendant guilty twice for the same *actus reus* and the same *mens rea*.

This double jeopardy problem is avoided if the defendant's biased motive when committing the underlying crime is the gravamen of the offense under the penalty enhancement statute. However, if biased motive is the gravamen of the offense, then the statute punishes thought and must be judged by the demands of the First Amendment.

This constitutional dilemma between Fifth Amendment

and First Amendment concerns is clarified by applying this Court's double jeopardy jurisprudence to the statute.

The Fifth Amendment's Double Jeopardy Clause "protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *See also Grady v. Corbin*, 110 S. Ct. 2084, 2090 (1990); *Missouri v. Hunter*, 459 U.S. 359 (1983); *Whalen v. United States*, 445 U.S. 684, 688, 700 (1980).[3]

There are two inquiries relevant to deciding whether multiple punishment is permitted in a particular case.[4] The first focuses on the word *offense* and the second on the word *punishment*. In the first inquiry, the question is whether the defendant is being prosecuted for one *offense* or multiple *offenses*. *See Blockburger v. United States*, 284 U.S. 299 (1932). This question arises when the defendant has engaged in a single course of conduct that appears to violate several statutes. If it is determined that there are multiple *offenses*, the question then becomes whether the legislature explicitly authorized multiple *punishment*. *See Missouri v. Hunter*, 459 U.S. 359 (1983). This Court has determined that, except when there is a question of separate trials, if a defendant has committed multiple offenses, the Double Jeopardy Clause

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[3]The Double Jeopardy Clause of the U.S. Constitution does not mention the word *punishment*. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...." U.S. CONST. amend V. However, Wisconsin's Double Jeopardy Clause explicitly uses the word *punishment*. "[N]o person for the same offense may be put twice in jeopardy of punishment ...." WIS. CONST. art. I, § 8.

[4]There is also a third question not relevant in this case. It asks whether there was a single trial or multiple trials.

does not prohibit the legislature from prescribing multiple punishment, even if the defendant committed the multiple offenses during a single course of conduct or transaction. *See Id* at 367-68.

To determine whether a defendant has committed multiple offenses, the relevant statutes must be compared to determine whether "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. When the relevant statutes in the instant case are compared, it is apparent that the elements of the two statutes are the same, except for the penalty enhancement's provision concerning a biased motive. *Compare* Wis. Stat. § 940.19(1m) (the aggravated battery statute for the underlying crime) *with* Wis. Stat. § 939.645 (the penalty enhancement statute).

The *actus reus* element of both statutes is the same -- namely, the underlying prohibited activity. In Mitchell's case, the *actus reus* under both statutes was Mitchell's being party to the crime of aggravated battery against one victim. The *mens rea* element is also the same in each statute -- that is, the defendant's intent to select a victim for the prohibited activity. In Mitchell's case, the *mens rea* was selecting a victim for aggravated battery. Proponents of the penalty enhancement statute would argue that selecting a victim for racial reasons is a different *mens rea* than simply selecting a victim. However, it is the intent element of a crime that constitutes the *mens rea*, not the reason for that intent. While the two statutes do not differ in *actus reus* or *mens rea*, they differ because the penalty enhancement statute includes a biased motive provision not found in the statute for the underlying crime. However, a biased motive is thought, not conduct.

This *Blockburger* analysis leads to the conclusion that the penalty enhancement statute either punishes the same *actus reus* and the same *mens rea* as the statute for the underlying crime, or else it punishes a biased motive. In either case, there is a constitutional problem with the penalty enhancement statute. If the penalty enhancement statute punishes the *actus reus* and *mens rea*, there is a double jeopardy problem. If it punishes the biased motive, there is a First Amendment problem.

A literal reading of this Court's leading cases on single-trial, multiple-punishment cases seems to indicate that only legislative intent analysis solves a double jeopardy problem for a single-trial case, even if the *Blockburger* analysis shows there is only one offense. *See Whalen*, 445 U.S. at 692-95; *Hunter*, 459 U.S. at 366-69. In *Hunter*, *Id.* at 366, this Court said:

> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended....

However, to apply that quote, or similar statements from other decisions, to all single-trial, multiple-punishment cases would be to ignore the particular facts of *Hunter* and other similar double jeopardy cases. This Court was able to resolve *Hunter* with legislative intent analysis because, in that case, the defendant had engaged in more than one *actus reus* and evidenced more than one *mens rea* during the single course of conduct. Thus, there was more than one offense.

In *Hunter*, the defendant engaged in armed criminal action and first degree robbery. This involved two separate

choices : the choice to commit a robbery and the choice to use a weapon. This Court concluded that multiple punishment for the two offenses was permissible because the legislature had indicated an intent to punish twice for the two offenses. *Hunter*, 459 U.S. at 368.[5]

Thus, where a defendant engages in more than one *actus reus* and exhibits more than one *mens rea* during a single course of conduct, the choice about multiple punishment is entirely a legislative choice and is not a constitutional problem. *See Whalen*, 445. U.S. at 730 (Rehnquist, C.J., dissenting). However, in cases like the instant one where two statutes prohibit only one *actus reus* and one *mens rea*, there is only one offense, and legislative intent analysis cannot control the resolution of the double jeopardy issue.

Legislative intent analysis cannot control single-offense, multiple-punishment cases because the Constitution stands in judgment of the legislature, not the legislature in judgment of the Constitution. The Constitution has mandated that there cannot be multiple punishment for a single *offense*. It would be pure nominalism to say that the legislature's intent mandates a conclusion that there are multiple offenses, even where there is only one *actus reus* and one *mens rea*. That would constitute a distortion of the word *offense* beyond all the bounds of common sense and would nullify any meaningful protection afforded by the Double Jeopardy Clause.

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[5]The case of *Albernaz v. United States*, 450 U.S. 333 (1981) was discussed extensively in *Hunter*. In *Albernaz*, there was also more than one *actus reus* and one *mens rea*. The defendant had conspired to import marihuana and to distribute marihuana. This Court concluded that Congress intended to impose multiple punishment.

In summary, traditional double jeopardy analysis shows that there is a double jeopardy problem with the penalty enhancement statute if it prohibits conduct rather than thought because the statute prohibits the same *actus reus* and same *mens rea* as the statute for the underlying crime. This double jeopardy problem cannot be solved simply by looking to legislative intent regarding multiple punishment because legislative intent controls only where there are multiple offenses. However, here there is only one offense because there is only one *actus reus* and one *mens rea*.

This potential double jeopardy problem is one of the ways in which the penalty enhancement statute differs from civil antidiscrimination laws. The civil laws purport to correct the harmful effects of discriminatory conduct. However, the regulation of conduct under the civil law has not been made subject to the demands of the double jeopardy clause.

II. UNLIKE CIVIL ANTIDISCRIMINATION LAWS, WISCONSIN'S PENALTY ENHANCEMENT STATUTE JEOPARDIZES THE DEFENDANT'S FIFTH AMENDMENT RIGHT TO PUT ON A LEGITIMATE DEFENSE BECAUSE THE STATUTE TRAPS A DEFENDANT INTO SELF-INCRIMINATION IF THE DEFENDANT BASES A DEFENSE ON THE CLAIM THAT THE UNDERLYING CRIME WAS MITIGATED BY THE HEAT OF PASSION ARISING FROM INSTINCTUAL, PRE-RATIONAL BIAS AGAINST A GROUP PROTECTED BY THE STATUTE.

In some circumstances, Wisconsin's penalty enhancement statute could deter a defendant from putting on a defense to the underlying crime out of fear that the defense would lead

to self-incrimination under the penalty enhancement statute. This would occur if the penalty enhancement's prohibited reasons for selecting a victim were actually evidence of a mitigating factor in the commission of the underlying crime. In such a case, the defendant might be inhibited from arguing mitigation as a defense for the underlying criminal charge, since this would result in self-incrimination under the penalty enhancement statute.

Wisconsin's penalty enhancement statute criminalizes bias and prejudice as if these were always intentional acts. However, bias and prejudice are two-edged swords. They can fuel a reasoning process that culminates in the formation of evil intent, the *mens rea* of a crime. In such a case, bias and prejudice are evidence of an aggravating factor in the crime. However, bias and prejudice can also be inchoate and instinctual feelings, located in the emotions or passions and traceable to irrational fear and ignorance. In a volatile situation, these emotions often burst forth in the heat of passion as an angry response to a perceived wrong. In such a case, bias and prejudice could be evidence of mitigating factors to the crime.

Bias and prejudice are not praiseworthy when they arise from pre-rational emotions, but they are less blameworthy and more understandable. If bias and prejudice were recognized as evidence of possible mitigating factors, this would not indicate society's approval of bias and prejudice in themselves. Nor would it indicate that the defendant's right to put on a defense is so absolute that it can bow to no other values. For instance, a defendant has no right to commit perjury to put on a defense. What the acceptance of bias and prejudice as evidence of mitigating factors would indicate is simply that society has recognized heat of passion as a

legitimate defense to some crimes because heat of passion reduces free will and therefore reduces culpability. It would further indicate society's recognition that bias and prejudice are species within the generic category of irrational passions.

In the instant case, the defendant could legitimately have made the following argument that the racial hatred leading to his crime was actually a mitigating rather than an aggravating factor. His racist incitement to battery was an irrational, emotional response to the historical mistreatment of African-Americans in the movie *Mississippi Burning*, where white men beat a black boy who was praying. He could argue that discussion of the movie provoked an uncontrolled, emotional response in him that could never have been provoked in even the most empathetic white person, because a white person stands outside the circle of historical oppression experienced by African-Americans as a group. That emotional response caused the individual differences of people to blur and made him identify all whites with those who did the beating in the movie and identify himself with the African-American boy in the movie who had to defend himself.

The record of this case indicates that such a defense was within the realm of possibility and that the defendant's racist incitement to the beating could legitimately be seen as emotional rather than rational. The record indicates that it was the defendant himself who flagged down the police to assist the victim of the beating. This could show that his earlier action was not a reasoned choice. When reason calmed his emotions, humanitarian choices overcame his racial animosity.

Mitchell faced a constitutional dilemma if he had decided to put on a defense claiming that bias and prejudice were

evidence of mitigating rather than aggravating factors in the underlying crime. He would thereby have incriminated himself of violating the penalty enhancement statute. The statute forbids a racial motive in the selection of a victim. The hypothetical defense above does not deny the defendant's racial motive. Instead, it mitigates the *mens rea* for the aggravated battery. Thus, the defendant could still be convicted of violating the penalty enhancement statute, even if his defense succeeded in mitigating the underlying crime.

The statute, therefore, has an impermissible chilling effect on protected Fifth Amendment speech because it deters the defendant's exercise of his right to put on a defense to the underlying crime. This not only sets up a contradiction in the defendant's Fifth Amendment rights; it violates the First Amendment as well.

The potential contradiction in Fifth Amendment rights is what distinguishes the penalty enhancement statute from the sentencing, process where there can be legitimate consideration of relevant bias and prejudice. *See Dawson v. Delaware*, 112 S. Ct. 1093, 1097 (1992); *Barclay v. Florida*, 463 U.S. 939, 949 (1983). At sentencing, a judge has the discretion to consider any relevant factor. Moreover, the defendant does not have to worry at sentencing that charges of bias and prejudice against him will negatively influence the jury in their deliberations about guilt or innocence for the underlying crime.

Its potential for causing a conflict in a defendant's Fifth Amendment rights is a second way that the penalty enhancement statute differs from civil antidiscrimination law. The defendant in a civil discrimination case does not risk self-incrimination by putting on a defense.

CONCLUSION

Too often, the legislature's answer to a societal problem is to throw a criminal law at it. This provides short-term emotional satisfaction and amasses political capital, but it provides little payoff in justice or in long-term solutions to problems. It also creates more problems than it solves.

The penalty enhancement statute for bias crimes is a prime example of this process of good intentions gone awry. The objective of the penalty enhancement statute is unquestionably praiseworthy -- namely, to stop insult from being added to injury when a crime assails the victim's race, religion, color, disability, sexual orientation, national origin, or ancestry.[6] However, criminal law is an ineffective and inappropriate vehicle to achieve this objective.

The penalty enhancement statutes add further burdens to the already overburdened judicial system and prison system. Both the federal and state court systems are overloaded trying to adjudicate cases based on present laws. The penalty enhancement statute adds nothing substantive to criminal justice that cannot be accomplished by prosecution under the present Criminal Code, combined with the sentencing discretion of a judge to take evidence of bias or prejudice into account where it is relevant to the crime committed. Yet the penalty enhancement statute will cause trials to be more complex because of the separate verdict required and will give the defendant another avenue through which to challenge the conviction.

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[6]The bias crime statute in some states adds gender to this list. Wisconsin's statute does not include gender.

While the separation of powers does not permit this Court to prevent a legislature from passing useless laws, this Court can deter overzealous legislatures by meticulously examining useless laws to determine if they pass constitutional muster.

It is the position of this *amicus* that Wisconsin's penalty enhancement statute is not constitutional. It is not like civil antidiscrimination statutes. It punishes thought rather than conduct.

For the foregoing reasons, this Court should affirm the Wisconsin Supreme Court's judgment that Wis. Stat. § 939.645 is unconstitutional.

Respectfully submitted,

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